Office - Supreme Court, U.S.
FILED
JUL 7 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2216

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LAURA M. BYRD,
Petitioner,

vs.

SAN FRANCISCO UNIFIED
SCHOOL DISTRICT,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE AGNOST
City Attorney
STEVEN A. DIAZ
Deputy City Attorney
Counsel of Record
PHILIP S. WARD
Deputy City Attorney
206 City Hall
San Francisco, CA 94102
(415) 558-3626
Attorneys for Respondent

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
REASONS WHY CERTIORARI SHOULD BE DENIED	4
CONCLUSION	6

TABLE OF AUTHORITIES

CASES	PAGE
Graver Tank & Manufacturing Co., Inc. v. *Linde Air Products Co.*, 336 U.S. 271 (1949)	5
International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 (1977)	5
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973)	4, 5
National Labor Relations Board v. *Waterman S.S. Corp.*, 309 U.S. 206 (1940)	4
United States v. *Johnston*, 268 U.S. 220 (1925)	4
STATUTES AND RULES	
Rule 17.1 of the Rules of the Supreme Court	4
Rule 17.1(c)	4

No. 81-2216

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LAURA M. BYRD,
Petitioner,

vs.

SAN FRANCISCO UNIFIED
SCHOOL DISTRICT,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

Beginning in 1971 and continuing through at least 1976, the San Francisco Unified School District (herein "the District") experienced a steadily declining student population and consequent reduction in funding from the State of California. This resulted in a surplus of teachers, many of whom had gained tenure during the "baby boom" that followed the end of World War II. This surplus was getting larger each year. Appendix B to Petition for a Writ of Certiorari herein, at 8a.

Initially the District attempted to avoid laying teachers off by adopting alternate strategies designed to reduce the surplus. The District encouraged leaves and sabbaticals and also instituted a "consolidation" program. When a school within the District had too many teachers for the number of students enrolled, the teachers with less seniority at that school were placed on a consolidation list. This had the effect of removing them from permanent assignment to the school. While they remained on full salary for the school year, they were assigned as needed throughout the city to substitute for teachers with regular assignments. *Id.*, at 8a-9a.

Since consolidation was disruptive to the teachers, and because consolidated teachers remained on full salary working or not, the District followed a policy of going first to the pool of consolidated teachers to fill personnel needs. *Id.*, at 9a. It was hoped that the District could thus avoid additional salary expenses for newly hired teachers as well as the costs incurred if a teacher on unpaid leave had to be reemployed to fill a vacancy. *Id.*, at 8a-9a; 27a-28a.

The plaintiff was a regularly employed and tenured teacher with the District in May of 1975 assigned to George Washington High School. The principal of her school, Mr. Saul Madfes, was at that time in the middle of his planning for the next academic year beginning in September. He was attempting to forecast the expected student enrollment, survey the curriculum desires of both students and faculty and construct a class schedule before the last day of school. *Id.*, at 9a-10a. At the end of this process he also had to identify and notify those teachers who would be surplus at the high school in September and would therefore be consolidated. *Id.*, at 8a-9a; 10a-11a.

At no time during this planning period did the plaintiff inform Mr. Madfes that she had decided to seek and had in fact applied for an unpaid study and travel leave for one year from July 1, 1975 through June 30, 1976. Even though she would not be available for the upcoming year, the plaintiff nevertheless filled out a proposed teaching schedule and submitted it to Mr. Madfes. He relied upon it and included plaintiff in the fall class schedule. *Id.*, at 12a-13a.

Given the financial squeeze in which the District found itself in 1975, it readily granted plaintiff's request for an unpaid year of leave. *Id.*, at 13a-15a. But due to plaintiff's intentional refusal to inform her principal of her plans, Mr. Madfes first learned of the leave request on June 13, 1975, the last day of school. *Id.*, at 14a. He had already composed his master schedule and informed seven teachers that they were to be consolidated. *Id.*

The next Monday Mr. Madfes immediately met with his administrators, reconstructed the fall schedule to account for plaintiff's absence and notified one of the consolidated teachers that she would not be forced to leave George Washington High School. He did this to preserve morale and set the schedule before summer vacation in order for teachers to plan their classes. *Id.*, at 14a-15a; 17a.

Then on August 4, 1975 the plaintiff wrote to the personnel officer of the District and said that she had reconsidered and wanted to rescind her leave. The recission request was handled by Dr. Frederick A. Kennedy, a black administrator. *Id.*, at 15a. Over the next several months Dr. Kennedy repeatedly informed plaintiff that the District did not have a vacancy for her, especially since plaintiff insisted that she not only wanted to return but that she wanted to return only to George Washington High School. *Id.*, at 16a-18a. The District had more than enough consolidated teachers already on salary to fill unexpected vacancies, and it chose not to rescind an unpaid leave and incur even more salary costs for the coming year.

The testimony of the District's witnesses established that no written rules governed rescission of study and travel leaves. Each such request was handled on a case-by-case basis. The District considered available funds, vacant positions, its program needs and other criteria. *Id.*, at 19a-21a. On the basis of these considerations the District declined to rescind the plaintiff's leave. She remained on leave in Washington, D.C. for most of 1976. Eventually she returned to her position as a teacher with the District, a position which she still occupies. *Id.*, at 18a.

The District Court concluded that the plaintiff had failed to produce any evidence that she was denied the leave rescission because of her race. *Id.*, at 25a. She failed to establish a *prima facie* case of discrimination under law. Moreover, the trial court concluded that even if a *prima facie* case of discrimination had been established, the District had convincingly refuted it by producing evidence of a "perfectly legitimate nondiscriminatory reason for refusing to rescind" that was not pretexual. *Id.*, at 28a. These findings and conclusions were affirmed without dissent by a panel of the Court of Appeals for the Ninth Circuit. Appendix A.

REASONS WHY CERTIORARI SHOULD BE DENIED

Nowhere in her Petition does the plaintiff discuss the provisions of Rule 17.1 of the Rules of the Supreme Court. A reading of that rule compels the conclusion that subsections (a) and (b) have no application herein. The plaintiff does not contend that the Court of Appeals decision below conflicts with decisions in the other circuits. Nor does this case involve a decision by a state court.

The only remaining basis for review in this Court, Rule 17.1(c), is also inapplicable herein. Throughout her Petition the plaintiff implies that the Court of Appeals has deviated from "applicable decisions of this Court," principally the holding in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). However the only issues raised by the plaintiff's arguments relate to questions of evidence and factual findings. Plaintiff does not contend that the courts below failed to apply the legal standard appropriate to a Title VII disparate treatment case. Rather she quarrels with the results they reached in applying that standard to the evidence.

It is a settled principle that a writ of certiorari is not issued in order to review evidence or second-guess the courts most familiar with the factual record. *National Labor Relations Board* v. *Waterman S.S. Corp.*, 309 U.S. 206, 208 (1940); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). This rule has added force when the plaintiff's dispute is with the trial court's resolution of issues of conflicting evidence and credibility of witnesses, which findings were not found to be clearly

erroneous by the Court of Appeals. *Graver Tank & Manufacturing Co., Inc.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

The plaintiff's two points of error are purely evidentiary and factual. The trial court is accused of overlooking or improperly excluding evidence proferred by plaintiff to show that her principal had acted in a biased fashion against blacks prior to May of 1975. Petition, at 14-16. She also contends that the District Court erred in concluding that Mr. Madfes had nothing to do with the denial of her request for rescission. *Id.*, at 16-18. Neither of these factual points warrants review by certiorari.

In any event, these factual issues were of little moment because the courts below properly concluded that plaintiff failed to carry her burden of proof. She failed to present a *prima facie* case of discrimination under any reading of the test articulated by this Court in *McDonnell Douglas* v. *Green, supra*, at 802-803, n. 13.

No inference of discrimination arose in this case sufficient to shift the burden of producing evidence to the District because there was no vacancy for which plaintiff could be considered. The District Court so expressly found and the plaintiff offers no arguments to the contrary. Appendix B, at 16a-17a; 19a; 27a. An employer can hardly be accused of racial discrimination for refusing to hire (or allow a return to duty) when no vacancy exists. Plaintiff totally failed to produce any evidence that she was treated less well on the basis of her race than other teachers seeking leave rescissions, the touchstone of a disparate treatment case. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335-336, n. 15 (1977). The District in fact proved that no one received a leave rescission during this period of time, regardless of race or sex. Appendix B, at 27a-28a.

Plaintiff's most serious omission, however, is highlighted by the manner in which she poses the "Question Presented" in her Petition. It focuses exclusively on the question of a *prima facie* case. It ignores the bulk of the evidence introduced by the District demonstrating that it declined to rescind plaintiff's leave on strictly financial grounds. The District had teachers

coming out of its ears. It had no incentive to pay plaintiff for a year of substitute work (if that) when it could allow her to remain on unpaid leave. Since no other leaves were rescinded, this constitutes a legitimate nondiscriminatory reason for rejecting the plaintiff's request. *Id.*, at 28a.

Therefore, even if the plaintiff's evidence was sufficient to establish a *prima facie* case of discrimination, the courts below acted properly in finding against her on the remaining elements of a disparate treatment case. The plaintiff is still not entitled to relief even if the question presented herein were resolved in her favor. This is not the type of case for which review by writ of certiorari was intended.

CONCLUSION

The plaintiff is not entitled to yet one more review of a case already deemed meritless by two federal courts. Her Petition presents no novel issues, no errors of law and no reasons for further occupying the attention of this Court. The Petition For a Writ of Certoriari herein should be denied.

DATED: July 6, 1982

GEORGE AGNOST
City Attorney
STEVEN A. DIAZ
Deputy City Attorney
Counsel of Record
PHILIP S. WARD
Deputy City Attorney

By_____
STEVEN A. DIAZ
Attorneys for Respondent
San Francisco Unified School
District

CERTIFICATE OF SERVICE

I, STEVEN A. DIAZ, attorney for Respondent, hereby certify that on the 6th day of July, 1982, I caused copies of this Brief in Opposition to Petition For Writ of Certiorari to be served on all parties required to be served by depositing three copies in the United States Mail, first-class postage prepaid, in an envelope addressed to Bruce A. Fredrickson, Webster & Fredrickson, 1522 K Street, N. W., Suite 1030, Washington, D.C. 20005.

DATED: July 6, 1982

STEVEN A. DIAZ
Deputy City Attorney
Counsel of Record